FARAD CONTINUATION SHEET NO.

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO.2740 OF 2005

Office Notes, Office Memoranda of Coram, appearances, Court's orders or directions and Registrar's orders	Court's or Judge's orders

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Mr.Deepak N.Salvi for the petitioner

Mrs.M.H.Mhatre APP for the Respondent/State.

Coram : R.S.Mohite,J

Date : 23.01.2006.

PC

1. This is a petition impugning a judgment and order passed by the Special Judge, Gr.Bombay on 6.10.2005 rejecting the application for leading additional evidence preferred by the prosecution under Section 311 of Cr.P.C. The facts of this case indicates that in a narcotic trial the prosecution has examined the Assistant Chemical Analyser attached to the Dy.C.C.Laboratory situated at old custom house. This witness gave certain

admissions which were damaging to the prosecution. His evidence was over on 22.12.2004 and those admissions were known to the prosecution. However, inspite of knowledge of such admissions, the prosecutor filed a written pursis closing the prosecution evidence stating that he has no further witnesses to examine. Thereafter the trial proceeded. 313 statements of the accused were recorded. Arguments on behalf of the defence were completed. In the course of argument, in reply, the prosecutor filed application under section 311 of Cr.P.C. seeking to examine a Chemical Analyser from another laboratory where the narcotic has been sent for examination. This application was made on 27.9.2005 i.e. after a period of over 10 months from the date when the pursis was filed closing the prosecution case. By placing reliance upon a judgment of the Apex Court in the case of **State (Delhi Administration) v/s. Pali Ram reported in AIR 1979 SC**

14, it was contended that the Apex Court has laid down that the assistance of an expert is essential to enable the Court to arrive at a just determination of the issue of the identity of the disputed writing. The fact that this may result in the "filling of loop-holes" in the prosecution case is purely a subsidiary factor which must give way to the paramount consideration of doing justice. My attention was also fairly drawn by a prosecutor to a judgment of the Apex Court in the case of **Mohanlal shamji Soni Vs. Union of India reported in AIR 1991 SC 1346,** in which the Apex Court has laid down that while exercising the power under Section 311, it was incumbant that due care should be taken by the Court while exercising the powers and it should not be used for filing up the lacuna left by the prosecution or by the defence or to the disadvantage of the accused or to cause serious prejudice to the defence of the accused or to give

an unfair advantage to the rival side and further the additional evidence should not be received as a disguise for a retrial or to change the nature of the case against either of the parties.

2. The similar effect are the observations of the Apex Court in the case of **Rajendra Prasad V/s. Narcotic Cell reported in 1999(6) SCC 110,** In the present case one expert witness has already been examined and he gave admissions in favour of the defence. There is no explanation as to why a written pursis was given to the Court closing the prosecution evidence and as to why no attempt was made for over a period of 10 months to examine another expert witness. The respondent nos.1, 2, & 3 are admittedly in jail. The trial Court has observed that this is an attempt by the prosecution to protract the trial. Such protraction shall cause prejudice to the respondent nos.1 to 3. In view of the aforesaid

circumstances, I am not inclined to exercise my jurisdiction under Article 227 of the Constitution of India. Petition is therefore, dismissed.

(R.S.Mohite,J)